

Section IV. Penalty Factors, is amended as follows:

23. Licensee's second appearance consists of a finding that Licensee offered ~~an unspecified number of~~ at least 15 different types of prohibited flavored tobacco products for sale on February 8, 2021.¹ These prohibited flavored tobacco products are listed in the report of DSI Inspector Joe Voyda² as Dutch – Irish Fusion, Java Fusion, Berry Fusion, Honey Fusion, Blue Dream Fusion, Rum Fusion, Zig Zag Purple, Blue and Pink, Backwoods Black Russian, Honey Berry, Russian Cream, Dark Stout, Honey Bourbon and Honey Black & Mild Wine. The prohibited flavored tobacco products were also photographed³; and

The Conclusions of Law are amended as follows:

1. The Administrative Law Judge and the St. Paul City Council have jurisdiction to consider this matter pursuant to Minn. Stat. § 14.55 (2022) and SPLC §§ 310.05, .06 (2021).
2. The hearing in this matter was conducted in accordance with the SPLC § 310.05 and the contested case procedures of Minn. Stat. §§ 14.57, .62 (2022).
3. The City provided proper notice of the hearing and complied with all relevant procedural requirements of ordinance, rule or law.
4. Because the City is proposing that disciplinary action be taken, it has the burden of proving by a preponderance of the evidence that adverse action is warranted against Licensee.⁴
5. Under the SPLC, the City Council may take adverse action against a City-issued license if the licensee violates a statute or ordinance related to the licensed activity, or if the licensee violates conditions placed on its license.⁵
6. The penalty matrix of the SPLC includes presumptive penalties for particular code violations.⁶
7. SPLC § 310.05(m) provides a matrix of penalties for first, second, third, and fourth appearances before the city council.⁷ For a first appearance, the matrix penalty is a \$500 fine. For a second appearance, the penalty is a \$1,000 fine. For a third appearance, the penalty is a \$2,000 fine and a 10-day suspension. For a fourth appearance, the penalty is revocation of the license.⁸
8. SPLC § 310.05(m) provides that the matrix penalties are presumed to be appropriate for every case, but also notes that the city council may deviate in an individual case where the

¹ Exhibit 5-18.

² Exhibit 5-18.

³ Exhibits 5-20-5-26.

⁴ Minn. R. 1400.7300, subp. 5 (2023).

⁵ SPLC §§ 310.05(m); 310.06(a), (b)(6)(a).

⁶ SPLC § 310.05(m).

⁷ The SPLC in effect at the time of the violation has since been amended, including the penalty matrix. The 2021 SPLC applies to this matter; all references to the SPLC are to the 2021 version unless otherwise stated.

⁸ SPLC § 310.05(m).

council finds and determines that substantial and compelling reasons exist to make it more appropriate to do so. ~~and Such deviation requires that council provide written reasons that specify why the penalty selected was more appropriate. Section 310.05(m) also discusses multiple violations stating "At a licensee's first appearance before the city council, the council shall consider and act upon all violations that have been alleged and/or incorporated in the notices sent to the council under the administrative procedures act up to and including the formal notice of hearing. The council in that case shall consider the presumptive penalty for each such violation under the "1st Appearance" column in paragraph (b) above. The occurrence of multiple violations shall be grounds for departure from such penalties in the council's discretion." The city council shall consider the presumptive penalty for each violation when a licensee's first appearance involves multiple violations and shall be grounds for departure from the presumptive penalties in the council's discretion.~~⁹ If the city council deviates, it must provide written reasons why the penalty selected was more appropriate than the presumptive penalty.¹⁰

9. Violations occurring after the date of the notice of hearing that are brought to the attention of the city attorney prior to the hearing date before an administrative law judge may be added to the notice(s) by stipulation if the licensee admits to the facts, and shall in that case be treated as though part of the first appearance. In all other cases, violations occurring after the date of the formal notice of hearing shall be the subject of a separate proceeding and dealt with as a second appearance before the council.¹¹
10. The record is silent as to why the ~~The City did not exercise its option to add the newly~~ alleged violations in the Second Notice of Violation were not added to the first appearance.
11. Upon a second, third, or fourth appearance before the city council by a particular licensee, the city council shall impose the presumptive penalty for the violation or violations giving rise to the subsequent appearance without regard to the particular violation or violations that were the subject of the first or prior appearance.¹²
12. The City may take appropriate disciplinary licensing action against Licensee based on the violation established in the Administrative Law Judge's January 12, 2024, Recommended Order on Summary Disposition, specifically, that Licensee violated § SPLC § 324.07(f) (offer flavored tobacco products for sale) on March 8, 2021.
13. The City has ~~not~~ shown substantial and compelling reasons to upwardly depart to revocation of the Tobacco Shop License held by Licensee. ~~from the second appearance presumptive penalty. Further, the record fails to support the most onerous sanction of license revocation.~~
14. In a Motion in Limine filed on March 7, 2024, Licensee moved to prohibit the City, its counsel, and witnesses "from referencing, testifying about, alluding to, and making arguments about any allegations about violations, and alleged facts related to any violations, in Respondent's first appearance, in Office of Administrative Hearings Docket No.: 60-6020-37157 . . . ; [p]recluding the City's witness from testifying on the matters he

⁹ Id. at § 310.05(m)(ii).

¹⁰ SPLC § 310.05(m).

¹¹ SPLC § 310.05(m)(iii).

¹² SPLC § 310.05(m)(iv).

does not have personal knowledge of; and [i]mposing a spoliation sanction on the City for the loss of recorded video evidence.”¹³

15. Licensee’s Motion in Limine was denied in its entirety.¹⁴

16. The attached Memorandum explains the reasons for these conclusions and is incorporated by reference.

17. Any Finding of Fact more properly considered a Conclusion of Law is adopted herein.

18. Any portion of the Memorandum more properly considered as a Conclusion of Law is incorporated herein.

The Memorandum is amended as follows:

I. First Appearance

As described by Judge Schlatter in her December 6, 2022, Findings of Fact, Conclusions of Law and Recommendation, less than a year after becoming owner of the Licensed premises, Licensee was faced with unprecedented events brought on by the COVID-19 pandemic and civil unrest following the police killing of George Floyd in Minneapolis. The City issued the First Notice of Violation that resulted in Judge LaFave granting the City summary disposition as to the violations relating to Licensee’s sale of single cigarettes and flavored tobacco and allowing patrons to smoke within the licensed premises.¹⁵ The city failed to demonstrate by a preponderance of the evidence that the remaining violations occurred.¹⁶

The end result was a finding that the Licensee had two violations and the recommendation of the Administrative Law Judges was an upward departure to the second box on the penalty matrix of \$1,000. ~~pursuant to SPLC, the multiple violations resulted in a \$1,000 penalty.~~

II. Second Appearance

This is Licensee’s second appearance, which was initiated during the pendency of the first appearance and originated with five alleged violations described in the Second Notice of Violation.¹⁷ Based on those five alleged violations, the City requested upward departure of the penalty matrix to revocation.¹⁸

Four of the five rescinded violations alleged in the Second Notice of Violation cited to events on January 18, 2021, as the factual basis.¹⁹ On January 18, 2021, a patron of Licensee, while on the Licensed Premises, was shot by an individual on the public city street. The City requested an upward departure on the penalty matrix to revocation. The one violation found was associated with the multiple violations related to the sale of prohibited flavored tobacco products on February 8, 2021. ~~not related to the January 18, 2021, incident.~~

¹³ Licensee’s Motion in Limine (March 7, 2024).

¹⁴ Hearing Digital Recording (March 8, 2024) (on file with the Minn. Office Admin. Hearings).

¹⁵ Ex. 8-4.

¹⁶ Ex. 113.

¹⁷ Ex. 5.

¹⁸ *Id.*

¹⁹ *Id.*

III. Penalty

A. Presumptive Penalty

First, the City argues that its penalty matrix is progressive and since it was granted an upward departure to box two in the first appearance, the starting penalty for the second appearance is the third box. The City argued that any other interpretation would allow the Licensee multiple violations before revocation was reached. The City ~~also argued~~ argues that ignoring the previous upward departure would render the consequences and severity of upwardly departing moot and would contravene its purposes. ~~This argument is absurd and ignores the fact that the upward departure itself serves its purposes. Rather, the City is attempting to double-dip the upward departure and give it a reverberating effect not contemplated in the SPLC.~~

~~Nothing in the SPLC indicates that an upward departure granted in a preceding appearance continues to the next appearance and starts the subsequent appearance at the step after the point of the upward departure. In fact, the SPLC states the opposite. Multiple violations “shall” be grounds for a departure in the case of a licensee’s first appearance. Second, third, or fourth appearances by a licensee are treated differently.²⁰ The SPLC states that for second appearances, “the council *shall* impose the presumptive penalty for the violation or violations giving rise to the subsequent appearance without regard to the particular violation or violations that were the subject of the first or prior appearance.”²¹ Therefore, the presumptive penalty for a second appearance is a \$1,000.00 fine.²²~~

The City also presented evidence and argued that City Council provided guidance on how seriously flavored tobacco violations should be viewed and the weight that these types of violations should be given. The City offered the newer and older versions of Saint Paul Legislative Code Chapter 324 and argued that comparison between the two versions showed that the number of available licenses had been reduced and in the updated penalty matrix, a second violation of this type leads to revocation of the License.²³

Finally, the City argued that no matter where the Licensee sat on the penalty matrix, the record before the Administrative Law Judge supported a finding that substantial and compelling reasons existed to upwardly depart to revocation. In support of their argument that this was an atypical fact pattern, the City offered testimony from Licensing Manager, Eric Hudak and the report and photos from Inspector Voyda, summarizing and identifying the varieties of prohibited flavored tobacco products found on the Licensed Premises on February 8, 2021.

B. Upward Departure Standard

The City may still deviate from the presumptive penalty “where the council finds and determines that there exist substantial and compelling reasons making it more appropriate to do so.”²⁴

²⁰ Ex. 11-12.

²¹ *Id.*

²² Ex. 11-10.

²³ Exhibits 12-4, 13, 13-4, 13-7.

²⁴ *Id.*

That is, if substantial and compelling reasons exist, the council may deviate upward or downward from the presumptive penalty.

The City laid out the following basis to support the request for upward departure:

The number of times that the provisions of the code related to the licensed activity had been violated.

The blatant nature of the violations and the total disregard for ordinances and license requirements.

The intentionality of Licensee's violations as evidenced by his willful disregard of instructions provided by the City during an in-person meeting with Licensee on June 17, 2020, to discuss his prior violations for selling prohibited flavored tobacco products.

The fact that the February 8, 2021, violations occurred less than 9 months after the June 1, 2020, violations.

The fact that Licensee had received training as to the extent and limitations of the permissions granted by the tobacco shop license along with copies of the applicable ordinances related to his license regulations.

The danger that the possession and sale of these prohibited flavored tobacco products caused the minors under age 21.²⁵

Saint Paul Legislative Code § 310.05(m) provides a matrix of penalties for first, second, third, and fourth appearances before the city council.²⁶ For a first appearance, the matrix penalty is a \$500 fine. For a second appearance, the penalty is a \$1,000 fine. For a third appearance, the penalty is a \$2,000 fine and a 10-day suspension. For a fourth appearance, the penalty is revocation of the license.²⁷

Saint Paul Legislative Code § 310.05(m) also provides that while the matrix penalties are presumed to be appropriate for every case that the city council may deviate in an individual case where the council finds and determines that substantial and compelling reasons exist to make it more appropriate to do so. Such deviation requires that council provide written reasons that specify why the penalty selected was more appropriate.

Saint Paul Legislative Code § 310.05(m) also discusses multiple violations stating "At a licensee's first appearance before the city council, the council shall consider and act upon all violations that have been alleged and/or incorporated in the notices sent to the council under the administrative procedures act up to and including the formal notice of hearing. The council in that case shall consider the presumptive penalty for each such violation under the "1st Appearance" column in

²⁵ Testimony of Eric Hudak at 43:10.

²⁶ The SPLC in effect at the time of the violation has since been amended, including the penalty matrix. The 2021 SPLC applies to this matter; all references to the SPLC are to the 2021 version unless otherwise stated.

²⁷ SPLC § 310.05(m).

paragraph (b) above. The occurrence of multiple violations shall be grounds for departure from such penalties in the council's discretion."

~~The City argues that substantial and compelling reasons exist. The City contends that multiple violations, even for this second appearance, shall be grounds for departure at the council's discretion. As explained above, this is a misreading of the SPLC § 310.05(m). The City asserts there were 20 different prohibited flavored tobacco products on February 8, 2021. The record does not support the City's assertion. Furthermore, it is unclear why the City believes each prohibited flavored tobacco product is a distinct, individual violation for determining that multiple violations occurred. The SPLC is clear that when there are multiple violations in a first appearance, the council "shall consider the presumptive penalty for each such violation type under the "1st Appearance" column."²⁸ That is, it looks at different types of violations to comprise multiple violations.~~

The requirement that the city council have "substantial and compelling reasons" to depart from the presumptive penalty provided in the matrix is similar to language found in the Minnesota Sentencing Guidelines that requires "substantial and compelling circumstances" to depart from the presumptive sentence for criminal convictions.²⁹

The Minnesota Court of Appeals noted that the City's ordinances "provides a penalty matrix for licensing violations that is akin to the presumptive sentences provided in the Minnesota Sentencing Guidelines."³⁰ While the Administrative Law Judge recognizes the significant differences between imposing a criminal sentence and imposing an administrative penalty for a municipal code violation, the concepts underpinning the legal standard of review are analogous and, therefore, instructive.

Minnesota courts have held that the presumptive sentence should only be exceeded if the enhanced penalty is deemed to be "more appropriate, reasonable or equitable than the presumptive [penalty]."³¹ The decision maker should impose the presumptive penalty unless "'substantial and compelling circumstances' based on aggravating factors warrant an upward departure."³² To properly impose a penalty that is an upward departure from the presumptive penalty in the sentencing guidelines, then, the decision maker must have a specific factual basis.³³ "Substantial and compelling circumstances" are "factual circumstances that distinguish the case, making it atypical."³⁴ Similarly, the SPLC requires the council to provide written reasons that specify why the penalty selected was more appropriate.³⁵

The Minnesota Supreme Court has also held that "generally in a case in which an upward departure in sentence length is justified, the upper limit will be double the presumptive sentence length."³⁶ The Court wrote: "Only in cases of 'severe aggravating circumstances' may

²⁸ Ex. 11-12.

²⁹ Minn. Sent. Guidelines II.D (2019).

³⁰ *Midway University & Hamline LLC d/b/a Midway Amoco BP*, 2021 WL 562416, at FN #1.

³¹ *Dillion v. State*, 781 N.W.2d 588, 595 (Minn. Ct. App. 2010) (citing *State v. Bingham*, 406 N.W.2d 567, 570 (Minn. Ct. App. 1987).

³² *Id.*

³³ SPLC § 310.05(m)(ii).

³⁴ *Dillion*, 781 N.W. 2d. at 595.

³⁵ Ex. 11-10.

³⁶ *State v. Evans*, 311 N.W.2d 481, 483 (Minn. 1981).

the district court impose a greater-than-double departure from the presumptive sentence. Such cases, we have stated, are ‘extremely rare’³⁷

Here, the City seeks, again, to revoke the Licensee’s license. The City has shown severe, aggravating, and factually atypical circumstances that warrant an upward departure to Revocation. ~~Revocation is a greater than double upward departure from the presumptive \$1,000 fine for a second appearance provided in the penalty matrix. Therefore, following the guidance of Minnesota Supreme Court, the City must show that severe, aggravating, and factually atypical circumstances warrant such an upward departure from the presumptive penalty.~~

This tribunal applied this legal analysis in a case regarding Midway Amoco BP, a gas station in St. Paul, Minnesota.³⁸ The city council “unanimously adopted the findings of fact, conclusions of law and recommendation of the administrative law judge.”³⁹ In that case, the city council found, based on the administrative law judge’s report, “that ‘severe aggravating circumstance support[ed] a greater-than-double upward departure from the presumptive penalty.’”⁴⁰ Those severe, aggravating circumstances included:

1. gunfire,⁴¹
2. shots fired from the gas station parking lot into neighboring buildings on multiple occasions,⁴²
3. neighbors who feared for their safety,⁴³
4. large disruptive crowds repeatedly gathering in the early morning hours dancing and smoking marijuana,⁴⁴
5. drug deals in the parking lot,⁴⁵
6. physical assaults,⁴⁶
7. and ultimately a homicide.⁴⁷

In that case, the “licensee fostered this criminal actively by selling single cigarettes and drug kits.”⁴⁸ “Between late April 2019 and the end of June 2019, the SPPD received more than 100 calls for service to the gas station.”⁴⁹

The city council found these events amounted to one of those rare instances where the “severe, aggravating and **factually atypical** circumstances . . . supported a [greater-than-double upward]

³⁷ *State. v. Shattuck*, 704 N.W.2d 131, 140 (Minn. 2005) (citing *State v. Spain*, 590 N.W.2d 85, 89 (Minn. 1999)).

³⁸ See *In re the Matter of the Cigarette/Tobacco and Gas Station Licenses Held by Midway University & Hamline LLC d/b/a Midway Amoco BP for the premises located at 1347 University Avenue in St. Paul License ID # 2010000243*, FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION (Minn. Office of Admin. Hearings Mar. 9, 2020).

³⁹ *Midway University & Hamline LLC d/b/a Midway Amoco BP*, 2021 WL 562416, at *1.

⁴⁰ *Id.* at *4.

⁴¹ *Id.*

⁴² Findings of Fact, Conclusions of Law and Recommendation at p. 14.

⁴³ *Id.* at p. 13.

⁴⁴ *Id.* at p. 6.

⁴⁵ *Id.*

⁴⁶ *Midway University & Hamline LLC d/b/a Midway Amoco BP*, 2021 WL 562416, at *4.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at FN #4.

departure from the presumptive penalty.”⁵⁰ The Minnesota Court of Appeals affirmed the city council’s revocation of the cigarette/tobacco and gas station licenses.⁵¹

In this case, Licensee violated the SPLC by selling ~~flavored~~ multiple varieties of prohibited flavored tobacco products. This violation is atypical because of the specific facts supporting the request for Adverse Action and upward departure to Revocation including:

The number of times that the provisions of the code related to the licensed activity had been violated.

The blatant nature of the violations and the total disregard for ordinances and license requirements.

The intentionality of Licensee’s violations as evidenced by his willful disregard of instructions provided by the City during an in-person meeting with Licensee on June 17, 2020, to discuss his prior violations for selling prohibited flavored tobacco products.

The fact that the February 8, 2021, violations occurred less than 9 months after the June 1, 2020, violations.

The fact that Licensee had received training as to the extent and limitations of the permissions granted by the tobacco shop license along with copies of the applicable ordinances related to his license regulations.

The danger that the possession and sale of these prohibited flavored tobacco products caused the minors under age 21.”⁵²

~~This singular violation is not a routine one, without the facts are atypical or especially and egregious facts. It does not They support an upward departure on the City’s penalty matrix to Revocation, much less a greater than double penalty.~~⁵³ The City argues that the proximity in time of the second violation is grounds for revocation. It is true that the February 8, 2021, violation was only a few months after the First Notice of Violation. A Licensee should not be afforded a free pass to violate the rules and regulations related to the License they hold while they dispute allegations. The City was correct in waiting until the First Adverse Action was resolved to amend the First Notice of Violation and add the correct penalty and license history. The City sees that as a basis to impose a harsher penalty, arguing that Licensee should have learned its lesson from the First Notice of Violation. However, Licensee correctly points out that at the time of the violation and the Second Notice of Violation, the first appearance was not resolved. In fact, it would be another six months before even an inkling of resolution and almost two years before final resolution of the first appearance.

~~The City has requested upward departure to revocation in the second appearance from the beginning. Despite rescinding four of the five alleged violations, it maintained its pursuit of revocation. Licensee has questioned if the City’s motives are, at least in part, racially or religiously biased. While the record does not support such a finding, it is understandable why Licensee might feel that way.~~

⁵⁰ *Id.* at *4 (emphasis added).

⁵¹ *Id.*

⁵² Testimony of Eric Hudak at 43:10.

⁵³ SPLC § 310.05(m).

The City argues that upward departure is appropriate based on the number of times the violations were committed, the number of times license conditions were violated, Licensee's prior knowledge, the seriousness of the violations that affect public health and safety, and the timing and frequency of the violations.⁵⁴ ~~The second appearance contains only one violation many violations as each separate prohibited flavored tobacco product constitutes a separate violation and contributes to the aggravating circumstances and atypical fact pattern alleged by the City. and upward departure was already granted for the first appearance violations. The Administrative Law Judge is not persuaded by the City's argument.~~

The City further argued that upward departure is appropriate because of Licensee's alleged willful disregard for the SPLC and knowledge that flavored tobacco products were prohibited.⁵⁵ As Licensee pointed out, when the Department inspector inspected the Licensed Premises on February 8, 2021, there were no hidden flavored tobacco products, no repeat of the other violations found in the first appearance, and even Mr. Hudak stated that it is not easy to know if a particular product is prohibited or not.⁵⁶ The record does not support a claim that Licensee willfully disregarded the SPLC.

Here, the City seeks to revoke Licensee's license. ~~Revocation is a more than one step up from the presumptive \$1,000 fine for a second appearance in the penalty matrix. This case has one tobacco-related violation. There is no basis for an upward departure to the most severe of possible penalties. Therefore, the recommended penalty is the presumptive penalty of \$1,000.~~

⁵⁴ Test. of E. Hudak.

⁵⁵ *Id.*

⁵⁶ *Id.*